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No. 92-449

In the Supreme Court of the United States

OCTOBER TERM, 1992

JUNG YUL YU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a naturalized citizen born in Korea, was entitled to a downward departure from his Sentencing Guidelines range based on "cultural differences" between the United States and Korea.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 954 F.2d 951.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. A petition for rehearing was denied on February 24, 1992. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on May 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Pennsylvania

to two counts of bribery of a public official, in violation of 18 U.S.C. 201(b)(1)(A). He was sentenced under the Sentencing Guidelines to ten months' imprisonment, to be followed by three years of supervised release. Pet. App. 24a-27a.

1. Petitioner, a naturalized citizen who immigrated from Korea in 1976, is an accountant engaged in the business of preparing tax returns. Between August 1988 and May 1989, an Internal Revenue Service agent conducted an audit of the tax returns filed by petitioner and his wife for 1985, 1986 and 1987. During the audit, petitioner asked the agent to be his "good friend" and "do a favor" for him.[1] Petitioner's wife gave the agent $30 in cash on two occasions during the audit. Pet. App. 4a-5a; C.A. App. 5a.

On April 17, 1989, petitioner and his wife met with the agent to discuss the audit and gave him $250 in cash, telling him that the money was for him, not for taxes. The agent then advised petitioner that petitioner owed $27,000 in tax deficiencies and penalties. Petitioner asked the agent to use his discretion and "do a favor" for him. In a meeting on May 5, 1989, petitioner offered to pay the agent $5,000 to "make them free," and he told the agent that the matter would have to be a secret. Five days later, petitioner

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[1] In 1987, the IRS had investigated the Woo Jung Bar, a business owned by Young Hak Kim, for payroll tax deficiencies. During a meeting with an IRS agent, Kim telephoned petitioner, who spoke to the agent about the taxes paid by Kim's business. Petitioner at that time also asked the agent to "do a favor" for Kim and to "help his client out" regarding the tax assessment proposed by the agent. C.A. App. 5a.

gave the agent $5,000 in cash in exchange for a "no-change" letter for the audit. Pet. App. 5a; C.A. App. 5a-6a.

2. The Sentencing Guidelines prescribed a range of 10-16 months' imprisonment for petitioner, based on a total offense level of 12 and a criminal history category of I. Pet. App. 27a. At the sentencing hearing on May 15, 1991, petitioner asked the district court to depart downward from the Guidelines range because of "cultural differences" between the United States and Korea. *Id.* at 5a-6a. Petitioner offered to call an expert witness to testify that a Korean would consider a bribe to a government official as an "honorarium" and would view the failure to offer such a payment as an insult to the government official. *Id.* at 6a, 60a.

The district court ruled that it had no authority to depart from the Guidelines sentencing range based on "cultural differences." The court accepted the government's argument that Section 5H1.10 of the Guidelines, which provides that "national origin" (along with race, sex, creed, religion and socio-economic status) is "not relevant in the determination of a sentence," prohibited such a departure. See Pet. App. 6a, 60a-64a. Petitioner was sentenced to ten months' imprisonment, with the final five months to be served in home confinement with work release and church attendance privileges. *Id.* at 25a-26a.

3. The court of appeals affirmed. Pet. App. 3a-11a. The court held that the facts of this case did not require it to decide whether the term "national origin," as used in the Sentencing Guidelines, included any cultural differences that might be related to a

defendant's foreign background, because on the facts presented by petitioner it was "perfectly clear * * * that the district court would have abused its discretion if it had departed downward in this case." Pet. App. 7a-8a. The court explained that although petitioner "point[ed] to his Korean origin as the source of his cultural values, he never contended in the district court that at the time of the bribes in this case he did not understand that his actions violated our laws." *Id.* at 8a; see 954 F.2d at 954. The court also noted that petitioner had been in the United States for approximately 12 years and was a naturalized citizen at the time of the offense; that he was a professional tax preparer and property owner with at least some familiarity with United States law; and that he had been well educated in Korea and had had some legal education, as well as some college-level education in the United States. *Id.* at 4a, 9a. Under the cir-cumstances of this case, the court found "no basis to avoid the obvious conclusion that [petitioner] was motivated to offer a $5,000 bribe to avoid a $27,000 tax liability by a desire to save $22,000, rather than by his belief that he was culturally bound to make the offer." *Id.* at 10a.

Judge Becker dissented. Pet. App. 12a-22a. Although he found an assertion of "cultural differences," without further definition, "too broad a basis for departure," Pet. App. 18a, Judge Becker argued that Section 5H1.10 does not completely foreclose a departure from the Guidelines range "based on excusable ignorance of American cultural norms that led to [a defendant's] criminal conduct." *Id.* at 20a. Judge Becker acknowledged that, for the reasons given by

the majority, he "suspect[ed] that [petitioner], a tax preparer who has lived in this country for many years, either knew or should have known that the United States does not tolerate taxpayers bribing tax collectors," but he "view[ed] that question as a disputed fact." *Id.* at 21a. He therefore would have vacated the sentence and remanded the case for the district court to decide whether to depart from the Guidelines range. *Id.* at 21a-22a.

ARGUMENT

1. Petitioner renews his contention that the district court should have considered departing downward from the sentencing range otherwise applicable under the Sentencing Guidelines because of "cultural differences" between the United States and petitioner's native Korea. Pet. 5-14. Petitioner contends that those cultural differences rendered his conduct substantially less culpable than that contemplated by the Sentencing Commission in establishing the Guidelines range for his offense. As the court below held, however, petitioner's case does not present the issue on which he seeks review. The court of appeals expressly declined, Pet. App. 7a-8a, to decide whether the Sentencing Guidelines would ever permit a downward departure based on "cultural differences," or whether all such differences were subsumed under the general prohibition against considering "national origin" as a factor in sentencing. See Guidelines § 5H1.10. The court "assume[d] without deciding that in some cases the cultural differences between the United States and another country may justify downward departure," Pet. App.

8a, but concluded that petitioner was not entitled to such a departure based on the facts of his case.

The court of appeals noted that petitioner was a well-educated individual with some sophistication in legal and tax matters (particularly since his professional practice involved preparing tax returns). Moreover, petitioner had become a naturalized citizen of the United States, and had lived in this country for 12 years before committing his offense. Pet. App. 9a. The court of appeals pointed out that petitioner "never contended in the district court that at the time of the bribes in this case he did not understand that his actions violated [United States] laws." *Id.* at 8a. On these facts, the court concluded that it was "perfectly clear * * * that the district court would have abused its discretion if it had departed downward in this case." *Id.* at 7a. Petitioner's challenge to that essentially factual determination does not warrant further review by this Court.

2. Even if the court had reached the issue, however, it would have been correct to reject petitioner's claim on the ground that a district court may not depart from the Guidelines sentencing range based on cultural differences between the United States and the defendant's country of origin. Under 18 U.S.C. 3553(b), a district court must impose a sentence within the applicable Guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." See, *e.g.*, *Burns* v. *United States*, 111 S. Ct. 2182, 2184-2185 (1991). In the Sentencing Reform Act of 1984,

Congress directed the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." Pub. L. No. 98-473, Tit. II, § 217(a), 98 Stat. 2020, codified at 28 U.S.C. 994(d).[2] To that end, Guidelines § 5H1.10 provides that those enumerated factors "are not relevant in the determination of a sentence."[3] Because a departure from the Guidelines range based on cultural differences between the United States and an immigrant defen-dant's native country would necessarily be based on the defendant's "national origin," such departures are not permitted under 18 U.S.C. 3553(b) and Guidelines § 5H1.10. Cf. *United States* v. *Natal-*

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[2] We agree with the dissent below, Pet. App. 16a-18a, that the legislative history of Section 994(d) adds little if anything to the meaning of the statutory language. See S. Rep. No. 225, 98th Cong., 1st Sess. 171 & n.409 (1983). Unlike the dissent, however, we believe that a claim of "cultural differences" based on having been reared and lived for an extended period in a foreign country before emigrating to the United States is comprehended within the statutory term "national origin."

[3] Unlike the policy statements in Guidelines §§ 5H1.1-5H1.6 that provide that certain factors are "not ordinarily relevant" in determining whether a sentence should be outside the guideline range, Section 5H1.10 flatly prohibits the consideration of race, sex, national origin, creed and socioeconomic status for any sentencing purpose. See, *e.g.*, *United States* v. *Mogel*, 956 F.2d 1555, 1561-1562 (11th Cir.), cert. denied, 113 S. Ct. 167 (1992); *United States* v. *Takai*, 941 F.2d 738, 742 (9th Cir. 1991); *United States* v. *Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991); *United States* v. *Hatchett*, 923 F.2d 369, 372-375 & n.4 (5th Cir. 1991); *United States* v. *Deigert*, 916 F.2d 916, 919 & n.1 (4th Cir. 1990); *United States* v. *Lowden*, 905 F.2d 1448, 1450 (10th Cir.), cert. denied, 111 S. Ct. 206 (1990).

Rivera, 879 F.2d 391, 393 (8th Cir. 1989) (assumed prohibition against considering "cultural background" would be constitutional); *United States* v. *Restrepo*, 936 F.2d 661, 670 (2d Cir. 1991) (court remanded for resentencing where unclear whether defendant's statement that his girlfriend should receive a lighter sentence because Colombians "like to tell [their] women what to do" resulted in departure based in part on "national origin").

To our knowledge, no court of appeals has held that a district court has discretion to depart from the Guidelines range based on cultural differences between the United States and the defendant's country of origin.[4] The cases upon which petitioner relies, Pet. 8-14, are plainly distinguishable. In *United States* v. *Big Crow*, 898 F.2d 1326, 1332 (8th Cir. 1990), the court upheld a downward departure under Guidelines §§ 5H1.5 and 5H1.6 based on the defendant's "excellent employment history, solid community ties, and consistent efforts to lead a decent life in [the] difficult environment [on an Indian reservation]." In that case, Section 5H1.10 was mentioned only in a footnote in the majority opinion and in the dissent, and both the majority and the dissent focused on the factors of "race" and "socioeconomic status" rather than on "national origin." In any event, neither opinion in the case suggests that Big Crow labored under any misapprehension as to the wrongness of his acts (aggravated assault on his wife and on a drinking

[4] The only case of which we are aware that squarely raised the issue was vacated by the Third Circuit, in an unpublished decision, in response to the government's appeal. See *United States* v. *Kang*, 950 F.2d 724 (3d Cir. 1991) (Table).

companion) because of "cultural differences" between Native American and mainstream American societies.

In *United States* v. *Jagmohan*, 909 F.2d 61 (2d Cir. 1990), the defendant, who had come to the United States nine years before his offense, attempted to bribe an official by writing him a personal check. The court concluded that the defendant's stable employment history and his "unusually unsurreptitious conduct in undertaking the bribery," taken together, were sufficiently exceptional to justify a downward departure. *Id.* at 65. The court's opinion offers no insight into what might have accounted for the defendant's "utter lack * * * of the sophistication usually shown by persons bribing an official," *ibid.*; in any event, it does not attribute the defendant's conduct to his foreign origins. Whatever the merits of the *Jagmohan* decision, its reasoning does not conflict with the decision of the court below with respect to the relevance of a claim of "cultural differences" under the Sentencing Guidelines.

Finally, in *United States* v. *Takai*, 930 F.2d 1427, superseded, 941 F.2d 738, 742-744 (9th Cir. 1991), the Ninth Circuit upheld downward departures for two defendants convicted of bribing an agent of the Immigration and Naturalization Service. The sentencing court in *Takai* concluded that the defendants' conduct constituted "single acts of aberrant behavior." *Id.* at 744; see United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, ch. 1, Pt. A, § 4(d).[5] Although both defendants

[5] See also *United States* v. *Andruska*, 964 F.2d 640, 645 (7th Cir. 1992) (criticizing *Takai*'s broad view of "aberrant behavior").

were of Japanese origin, nothing in the court's opinion suggests that Japanese culture would have condoned bribing officials, or that any cultural misperception contributed in any way to their actions or to the district court's decision to mitigate their sentences.

3. Petitioner also contends, Pet. 15-18, that the district court had discretion to depart from the Guidelines range because Guidelines Parts 5H (including Section 5H1.10) and 5K (dealing with departures in general) are "policy statements," as opposed to "guidelines," and as such were not binding on the district court. That claim has been foreclosed, however, by this Court's decision in *Williams* v. *United States*, 112 S. Ct. 1112 (1992). In *Williams*, the Court held that "policy statements" that prohibit a district court from taking certain factors into account provide "an authoritative guide to the meaning of the applicable guideline," so that failure to comply with such a policy statement results in an incorrect application of the Guidelines themselves. *Id.* at 1119-1120. Section 5H1.10 is the same sort of "prohibitory" policy statement that was at issue in *Williams*. Thus, petitioner's argument that "a sentencing court may consider policy statements * * * [but] is not controlled by them," Pet. 18, has already been rejected by this Court.

4. Finally, petitioner contends, Pet. 19-21, that the court of appeals' decision that a downward departure based on "cultural differences" would have been an abuse of discretion in this case, even if such departures might in some circumstances be permitted under the Guidelines, improperly denied him the op-

portunity to present his evidence of such differences to the district court in the first instance. Petitioner did, however, make an offer of proof to support the departure before the district court, Pet. App. 60a-64a, and he does not identify any new or additional evidence that he would present if the case were remanded to the district court. There was no need for the court of appeals to remand the case, because the court could properly conclude from the record that even if petitioner's proffered evidence were received and accepted as true, no departure based on cultural differences would be justified. The court of appeals did not "speculat[e] that the testimony and evidence [offered by petitioner] would not have swayed the trial judge," Pet. 21; it held that the judge would have abused his discretion had he been swayed. That holding was within the province of the court of appeals in interpreting the existing record, and it warrants no further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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